



STATE OF NEW JERSEY
Board of Public Utilities
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TELECOMMUNICATIONS

IN THE MATTER OF THE)	ORDER ON MOTION
IMPLEMENTATION OF THE FEDERAL)	
COMMUNICATIONS COMMISSION'S)	
TRIENNIAL REVIEW ORDER)	DOCKET NO. TO03090705

(SERVICE LIST ATTACHED)

BY THE BOARD:

On August 21, 2003, the Federal Communications Commission ("FCC") issued its Triennial Review Order ("TRO")¹, which adopted new and revised rules aimed at promoting local telephone and broadband competition in CC Docket Nos. 01-338, 96-98, and 98-147. In its revised rules, individual states were charged with implementing vital aspects of the TRO related to the unbundling of the incumbent local exchange carrier's ("ILEC") network pursuant to 47 U.S.C. § 251(c)(3).

The TRO, which became effective on October 2, 2003, required state commissions to conduct a detailed analysis to determine whether competitive local exchange carriers ("CLECs") are impaired without access to specific unbundled network elements ("UNEs"). If impairment is found, the UNEs will continue to be unbundled at rates consistent with the FCC's Total Element Long Run Incremental Cost ("TELRIC") methodology. The rules generally required state commissions to perform an analysis to determine if CLECs would be impaired under 47 U.S.C. § 252(d)(2)(B) without unbundled access to certain loops, transport, and local circuit switching.

Pursuant to the FCC's directive, the Board initiated proceedings in this docket and issued an Order dated October 28, 2003 directing VNJ "to file its *prima facie* case no later than December 3, 2003."² Based on that directive, on December 3, 2003, VNJ filed with the Board testimony of its witnesses, specifying the relief sought by VNJ in this proceeding. Discovery and discovery-related motion practice ensued, and a hearing schedule was established. Three days prior to the commencement of hearings in this proceeding, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in *United States Telecom*

¹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Federal Communications Commission, CC Docket Nos. 01-338, 96-98-98-147 (rel. Aug. 21, 2003) ("TRO").

² See Prehearing Order, /M/O the Implementation of the Federal Communications Commission's Triennial Review Order, Docket No. TO03090705 (October 28, 2003), at 9.

Association v. Federal Communications Commission, No. 00-1012 (decided March 2, 2004) (“Court Opinion”), vacated significant portions of the TRO, including the FCC’s subdelegation to state commissions of decision-making authority over impairment determinations.³

Shortly thereafter, a telephone conference with the active parties was conducted to discuss the impact of the Court Opinion on the proceeding in this docket. The parties were informed of the Board’s receipt of an Emergency Motion of Verizon New Jersey Inc. (“VNJ”) for a Ruling Staying the Board’s Proceedings Implementing the FCC’s Triennial Review Order (“VNJ’s Motion for a Stay”). The parties discussed and ultimately agreed to adjourn the hearing scheduled in this docket for Friday, March 5, 2004. The parties further agreed to file their responses to VNJ’s Motion for a Stay and to offer their comments on other alternatives, including the procedure adopted by the Florida Public Service Commission (“Florida procedure”) in staying its proceeding in Docket No. 030852. Subsequently, Commissioner Connie O. Hughes issued an Order notifying the parties that the hearings scheduled for Friday, March 5, 11 and 12, 2004 were adjourned to allow the entire Board the opportunity to consider VNJ’s Motion for a Stay at its next scheduled agenda meeting.⁴ The parties were directed to file their responses to VNJ’s Motion for a Stay by Friday, March 5, 2004.⁵

VNJ Motion for a Stay

On March 3, 2004, VNJ filed its expedited motion asking the Board to immediately stay further non-hot cut related proceeding in this docket until such time as there is a determination on the states’ role following a determination on remand by the FCC.⁶ VNJ claimed that continuation of the proceeding would be inefficient because the FCC’s subdelegation to state commissions to make certain impairment determinations was invalidated by the Court Opinion.⁷ Moreover, VNJ claimed that the D.C. Circuit’s decision “also vacated the FCC’s underlying nationwide impairment standards for mass market switching and the dedicated transport elements (DS1, DS3 and dark fiber), and remanded those standards to the FCC for further examination and revision in conformance with the Opinion.”⁸ Thus, VNJ argued that even if the FCC’s delegation of authority was not vacated, “the standards upon which the state cases were predicated have been invalidated.”⁹

COMMENTS OF THE PARTIES

AT&T

AT&T Communications of NJ, L.P. (“AT&T”) objected to VNJ’s Motion for a Stay.¹⁰ AT&T argued that although the D.C. Circuit vacated certain provisions of the TRO, the Court Opinion was stayed “until the later of the denial of any rehearing request or 60 days. During that 60-day period, the FCC’s rules remain in effect and the rules and deadlines imposed by the FCC for completing the Board’s 9-month proceeding remains in place.”¹¹ AT&T argued that there was a

³ The D.C. Circuit temporarily stayed its vacatur “until no later than the later of (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from [March 2, 2004].” Court Opinion at 61.

⁴ See Single Commissioner Order, I/M/O the Implementation of the Federal Communications Commission’s Triennial Review Order, Docket No. TO03090705 (March 4, 2004).

⁵ Ibid.

⁶ VNJ’s Motion for a Stay at 1, 3.

⁷ Id. at 2

⁸ Ibid.

⁹ Ibid.

¹⁰ AT&T’s March 4, 2004 Opposition to VNJ’s Motion for a Stay (“AT&T’s Opposition”).

¹¹ Id. at 1.

“substantial likelihood” that the initial stay would be extended pursuant to a majority of the FCC commissioners who indicated their intention to seek a stay and review of the Court Opinion.¹² AT&T indicated that it, and several other parties, supported the FCC majority’s actions.¹³ AT&T also argued that the Board should continue with its proceedings in this docket to avoid market confusion and because the D.C. Circuit recognized that “states have invaluable –and clearly lawful- input into the unbundling decisions, both in fact gathering and providing advice on how they affect critical decisions involving local competition.”¹⁴ AT&T stressed that the Board is in the best position to compile a full and complete record, and that simply moving the pre-filed testimony and exhibits into the record without the opportunity to test it through cross-examination and oral presentations, was an inadequate fact gathering method.¹⁵ AT&T submitted that the Board would likely be asked, “at a minimum, to provide facts and counsel on whether competition has (or can) develop in New Jersey in the absence of key unbundled network elements,” and therefore would need the factual evidence that could be gathered at hearings in this docket.¹⁶

MCI

In its Opposition to VNJ’s Motion for a Stay, MCI argued that “the delegation of authority to state commissions to determine impairment on a more granular basis, is the prevailing law and remains the law until at least May 1, 2004.”¹⁷ MCI asserted that the FCC and other parties, including MCI plan to file an emergency petition for a stay of the Court Opinion and seek Supreme Court review.¹⁸ MCI thus argued that the Board should continue with the proceedings and further develop the record to “identify and remove impairments to facilities-based residential competition.”¹⁹ MCI claimed that the Florida procedure was not necessarily appropriate for New Jersey, given that the scope of the Florida proceeding was more extensive and because Florida has already completed its mass market switching part of the case. However, MCI noted that should the Board adopt an approach similar to the Florida procedure, the parties should be permitted to engage in the full evidentiary process, including but not limited to evidentiary hearings, cross-examination and post-hearing briefs as outlined in the procedural schedule in this docket.²⁰ MCI also argued that the Board should expand the record to include information regarding the “economics of UNE-L for mass markets.”²¹

Ratepayer Advocate

The Division of the Ratepayer Advocate (“RPA”) filed a letter in opposition to VNJ’s Motion for a Stay and for reconsideration of Commissioner Hughes’ Order issued on March 4, 2004, which adjourned the March 11 and 12, 2004, hearing dates.²² The RPA reserved its right to contest on procedural due process grounds whether it is appropriate for the Board to consider VNJ’s Motion for a Stay in that VNJ made no showing of immediate and irreparable harm, and

¹² Id. at 2.

¹³ Ibid., citing press releases of AT&T, NARUC, NASUCA, Michigan PSC, United Seniors Association, New Jerseyans for Technology and Economic Growth, Maryland Coalition for Local Competition, Pennsylvanians for Local Competition, the Farm Bureau, MCI, Covad, Z-Tel, Frontiers of Freedom, Small Business Survival Committee, CompTel/Ascent and IBEW.

¹⁴ AT&T’s Opposition at 2-3.

¹⁵ Id. at 3.

¹⁶ Ibid.

¹⁷ MCI’s March 5, 2004 Opposition to VNJ’s Motion for a Stay at 1-2.

¹⁸ Id. at 2.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Id. at 3.

²² RPA’s March 5, 2004 Opposition to VNJ’s Motion for a Stay and Motion for Reconsideration at 1.

“whether the short comment period is inconsistent with applicable procedure, and implicates a denial of due process.”²³ The RPA recommended that the Board continue this proceeding because the FCC’s rules still govern at this time and because of the announced intents of the various parties to appeal the Court Opinion. The RPA claimed that it would be economically and administratively efficient to continue the proceeding, submitting that the record “can be used for (a) the TRO proceeding, if the order of vacatur is stayed (b) presentation to the FCC as granular evidence of the marketplace in New Jersey, or (c) a new proceeding to be undertaken pursuant to Section 261(c) of the Federal Telecommunications Act in order to preserve UNE-P in New Jersey.”²⁴ The RPA also outlined some of the outstanding issues and obligations of VNJ in this proceeding, and requested that the Board (1) ask VNJ to clarify “its intent regarding the transition processes outlined in the TRO;” and (2) confirm that VNJ will provide a list of witnesses that it does not intend to cross-examine and respond to all outstanding discovery in a timely fashion.²⁵ Finally, the RPA submitted that if the Board decides to stay the proceeding, “then such stay should apply with equal force to batch hot-cuts.”²⁶ The RPA opposed the alternative of following the Florida procedure in this proceeding.

Covad

Covad Communications commented that this docket should proceed without delay because of the legal obligations imposed by the currently effective TRO.²⁷ Covad posited that the record should be fully developed by the Board given its “expertise, knowledge and ability to gather the granular information necessary to make decisions” on the impairment issues, and because development of those facts are essential for “maintenance of competition in the industry.”²⁸

SNiP LiNK and XO

SNiP LiNK and XO posited that the Court Opinion was not currently in effect and that several parties to the D.C. Circuit matter, including the FCC, had indicated their intent to seek a stay of the Court Opinion.²⁹ As such, SNiP LiNK and XO claimed they were ready to proceed with the hearings in this matter without delay, but indicated that if the Board was inclined to temporarily defer the proceedings, it was their recommendation that the Board follow the Florida procedure.³⁰ Specifically, SNiP LiNK and XO proposed:

²³ Id. at 2-3.

²⁴ Id. at 5.

²⁵ Id. at 6.

²⁶ Ibid.

²⁷ Covad’s March 5, 2004 Comments to VNJ’s Motion for a Stay at 1.

²⁸ Ibid.

²⁹ March 5, 2004 Comments of SNiP LiNK and XO at 1.

³⁰ Id. at 2.

(1) the parties agree to stipulate to the admission of all pre-filed testimony and associated exhibits into the record of this proceeding; (2) the Board enters into the record of this proceeding all pre-filed testimony and associated exhibits filed by the parties; (3) the parties agree to reserve the right to cross-examine the witnesses should the proceedings recommence; (4) the Board holds the proceeding in abeyance, pending the outcome of the various appeals of the DC Circuit decision and any FCC action; and (5) the Board schedules a status conference for 30 days after the issuance of its order holding the proceeding in abeyance to update the status of the TRO.³¹

CLEC Coalition

ARC Networks, Inc. d/b/a InfoHighway Communications, Corp., Broadview Networks, Inc., BullsEye Telecom, Inc., McGraw Communications, Inc., and Metropolitan Communication's Inc., (collectively the "CLEC Coalition") filed its Opposition, asserting that VNJ's Motion for a Stay was premature and that the Board should proceed with the fact-finding portion of the proceeding in the same fashion as other state commissions have, including New York, Connecticut, Indiana and Oklahoma.³² Additionally, the CLEC Coalition asserted that if the Board grants VNJ's Motion for a Stay, the Board should adopt the Florida procedure with the same process as proposed by SNiP LiNK and XO.³³ The CLEC Coalition indicated that, "subject to review of the specific terms, [it] supports [VNJ's] offer to voluntarily forebear seeking relief in the event this proceeding is not completed by the Board by July 2, 2004, the nine month deadline established in the TRO for completing state impairment proceedings."³⁴

Conversent

Conversent Communications of New Jersey, LLC ("Conversent") commented that the Court Opinion had no impact on the hot cut portion of the Board's proceedings, and thus, that portion of the proceedings should continue to proceed.³⁵ Conversent argued that although further guidance from the Federal courts may not be immediately forthcoming, "there is a clear need for rules to govern the interconnection of networks and access to network elements through unbundling."³⁶ Thus, Conversent urged the Board to order that all UNEs offered in current interconnection agreements will remain in effect until it enacts its own unbundling rules. In particular, Conversent suggested that the Board should, consistent with federal law and independent state law, order that VNJ will continue to be obligated to provide unbundled access to Dark Fiber Inter-Office Transport in New Jersey.³⁷ Conversent argued that there is "clear authority for the Board to enact its own unbundling rules under federal law, and that the Board could also do so on the basis of independent state authority."³⁸ Conversent also argued that the Board has the authority to require VNJ to comply with the requirements of 47 U.S.C. § 271, which imposes upon VNJ "a continuing duty to provide unbundled access to, *inter alia*, its local loops, as well as local transport – including DS1, DS3 and Dark Fiber transport, at just and

³¹ Ibid.

³² March 5, 2004 Comments of CLEC Coalition at 2.

³³ Ibid.

³⁴ Ibid.

³⁵ Conversent's March 5, 2004 Comments to VNJ's Motion for a Stay at 1.

³⁶ Id. at 2.

³⁷ Id. at 4.

³⁸ Id. at 3.

reasonable rates.”³⁹ Lastly, Conversent suggested that the Board use this proceeding or open another proceeding to enact its own rules to govern interconnection and access to VNJ’s UNEs in the absence of “lawful federal rules in place as a result of the imminent *vacatur* set forth in the D.C. Circuit Court’s ruling.”⁴⁰

CWA

The Communications Workers of America (“CWA”) supported VNJ’s Motion for a Stay, and in the alternative supported “a motion to enter pre-filed testimony into the record, reserve the right of parties to cross-examine witnesses if and when the proceeding were to continue, suspend the case for sixty days, and then reconvene to decide the future direction of the proceeding.”⁴¹ CWA opined that continuing this proceeding would be unproductive if the Court Opinion is upheld because in that scenario, “the FCC would have to develop new unbundling rules and determine the role-if any-of the State Commissions.”⁴²

VNJ

VNJ submitted comments in response to the telephone conference and submitted that Allegiance Telecom of New Jersey, Inc. supports VNJ’s Motion for a Stay.⁴³ VNJ also claimed that the TRO imposed nine-month deadline within which the Board must make its ruling on its TRO proceeding is of no bearing to its Motion for a Stay.⁴⁴ VNJ submitted:

in the unlikely event that on that day the current TRO rules will be in effect (and not otherwise stayed or moot), failure to meet the deadline would permit [V]NJ to petition the FCC to itself decide the triggers-related issues before the Board. Assuming the Board implements a stay of the instant proceedings, however, Verizon NJ has agreed to forbear from seeking such relief for the duration of the stay. Moreover, should the stay be dissolved and the current case be restarted because the decision of the D.C. Circuit is substantially modified or reversed on rehearing or further appeal, Verizon NJ will treat as tolled the period from the issuance of the stay until July 2, 2004.⁴⁵

With respect to the Florida procedure, VNJ indicated that it did not see the need for creation of such a record, but had no objection to it.⁴⁶ VNJ declined to waive cross-examination of any opposing witnesses at the time of the filing of the comments other than Richard Anderson and David A. Graham.⁴⁷ Finally, VNJ stated that “[u]ntil there is greater clarity regarding the Board’s lawful role in the ‘impairment’ process, the Board would be well-advised to join the numerous other states that have stayed their TRO proceedings.”⁴⁸

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 6.

⁴¹ CWA’s March 5, 2004 Comments to VNJ’s Motion for a Stay at 1.

⁴² *Id.* at 1-2.

⁴³ VNJ’s March 5, 2004 Comments at 1.

⁴⁴ *Id.* at 2.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Id.* at 2-3.

⁴⁸ *Id.* at 3.

RPA's Opposition to VNJ's Comments

On March 5, 2004, subsequent to the filing of VNJ's Comments, the RPA issued a letter indicating that VNJ's Comments were inappropriate supplemental additions to its Motion for a Stay and should be rejected by the Board.⁴⁹

BOARD DECISION

It should go without saying that, of course, the Board is committed to fulfilling its obligations with respect to applicable law governing this proceeding. As the parties have noted, the FCC's TRO is currently governing law and a factual record will assist both this State and the FCC in future proceedings, regardless of the final disposition of the D.C. Circuit decision. However, the Board notes that several parties agree that the standards governing the proceeding may be altered in the near future, and that there is undeniable uncertainty caused by the D.C. Circuit's decision. Accordingly, for purposes of administrative economy and the currently effective requirements governing this proceeding,⁵⁰ the Board HEREBY GRANTS VNJ's Motion for a Stay CONDITIONED UPON VNJ's agreement that it will forebear seeking relief from the FCC on the basis that the Board did not timely complete its obligations in this proceeding, and will toll the time period beginning March 5, 2004 (the first scheduled day of hearings in this proceeding) up to and until July 2, 2004 (or any other time period that the FCC or other authority shall deem to be the final date for completion of state commissions' impairment cases), thereby allowing the Board, at a minimum, the same amount of time it would otherwise have had to complete its obligations under the TRO absent the stay. Thus, should this matter be reopened, the proceeding can continue, without objection by VNJ, from the date the hearing is opened to a date equal to the number of days the current matter is or will be tolled, regardless of the July 2, 2004 date. In granting VNJ's Motion for a Stay, the Board notes that VNJ had no objection to the Florida procedure, such that the Board FINDS no prejudice to any of the parties if a procedure consistent with that used by the Florida Public Service Commission is adopted by the Board. To this end, the Board DIRECTS all active parties to this proceeding to appear at the Board on March 19, 2004 at 10:00 a.m., for the adoption of the following process:

1. Counsel for VNJ to place on the record VNJ's agreement to unequivocally forebear on behalf of VNJ with full authority to do same, from petitioning the FCC to itself decide the triggers-related issues before the Board as described herein;
2. The admission and entry into the record of all pre-filed testimony and associated exhibits filed by the parties of this proceeding;
3. The parties reserving on record the right to engage in the full evidentiary process including, but not limited to, evidentiary hearings, cross-examination and post-hearing briefs as outlined in the procedural schedule should the proceedings recommence; and
4. The parties' placing on the record any objections or comments to the above process.

⁴⁹ RPA's March 5, 2004 letter comment on the filing of VNJ's Comments.

⁵⁰ See 47 C.F.R. § 51.319(a)(7)(i); TRO at ¶¶ 190, 339, and 527.

The Board FURTHER DIRECTS that the hearings scheduled for March 17, 18, and 26 are hereby indefinitely adjourned. However, the parties are ORDERED to continue completely responding to any outstanding discovery requests related to this proceeding. A status conference will be scheduled upon notice, most likely after the stay of the D.C. Circuit's decision has elapsed, to address whether to continue and/or expand the evidentiary record in this proceeding.

The parties are FURTHER ORDERED to appear at the Board on April 13 and 16, 2004, prepared for the commencement and completion of hearings on the hot cut-related aspects of this proceeding.

DATED: March 17, 2004

BOARD OF PUBLIC UTILITIES
BY:

SIGNED

JEANNE M. FOX
PRESIDENT

SIGNED

FREDERICK F. BUTLER
COMMISSIONER

SIGNED

CAROL J. MURPHY
COMMISSIONER

SIGNED

CONNIE O. HUGHES
COMMISSIONER

SIGNED

JACK ALTER
COMMISSIONER

ATTEST:

SIGNED

KRISTI IZZO
SECRETARY